

Governmental Advisory Committee
to the U.S. Representative to the
Commission for Environmental Cooperation

November 13, 2002

The Honorable Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue
Washington, D.C. 20460

Dear Governor Whitman:

The Government Advisory Committee (GAC) to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC) met in Washington, D.C. on October 24th and 25th. The advice letter to you that follows is based upon our deliberations which took place during that meeting in the nation's capitol.

Assistant Administrator Judith Ayres, though scheduled, was unfortunately unable to join us during our October meeting. She was capably represented, however, by Deputy Assistant Administrator Jerry Clifford who joined us in her absence and the GAC appreciated his enthusiastic observations supporting the work of our committee as well as that of our sister entity, the National Advisory Committee (NAC). We were pleased to hear during his remarks that a detailed response to our last advice letter is forthcoming and we look forward to receiving it at EPA's earliest convenience.

One of the areas that Mr. Clifford asked us to target during our deliberations was that of emerging issues related to environment and trade both here as well as in other parts of the world. He suggested that our input on this topic would be valuable to the United States as it exercises the unique opportunity to chart the CEC course in its current capacity as lead country during the remainder of this year. We are disappointed that so much of this leadership year has passed without a strategic refocusing of the vision for the CEC. But we look forward to the United States seizing this opportunity during the second half of the year to establish its unique vision for the CEC in a targeted and intensive fashion.

In response to Mr. Clifford's request, the GAC has identified several major emerging trends that should be the focus of the CEC's priorities, not only during the remaining year but for several years to come in order to assure their effective implementation. Those trends include the following three topics: water as a natural resource and commodity on the North American continent, the nexus between trade and the environment and resolving any unique tensions between the two and the meaningful engagement and full integration of indigenous people within CEC's programs and operations. These issues will be more fully addressed below in the advice letter. Also, it has to be said that none of these emerging issues can be effectively addressed without a more strategic, targeted framework, both specific and measurable in the short and long term adopted by this trilateral organization.

As you may know, the newly appointed CEC Director of Programs Douglas Wright was able to join us during the first day of our meeting and outlined an appealing vision for the future of the CEC. We would like to applaud the Secretariat for his prompt appointment and the GAC is favorably impressed that Mr. Wright is already serving the Commission well by helping to sustain the forward momentum of the organization, despite the transitional stage that the leadership of the Secretariat is currently experiencing. Mr. Wright indicated that his focus will be on developing a more strategic approach in the context of the CEC Work Plan, as well as it's long term vision and budgetary goals, while also incorporating effective measurement and evaluation tools in the process. As stated above, the GAC believes that a key focus for the CEC should be in the development of a strategic but unique vision and we are strongly encouraged by his remarks identifying a firm commitment to developing a cohesive and comprehensive approach that should served the Commission well into the next decade. We remain available and look forward to advising on how to make this happen in the most expeditious and appropriate manner.

The GAC would like to compliment EPA for its organizational efforts and wonderful resources which were provided during the course of our two day meeting. The speakers made available to us were of the highest caliber and quality, providing a most informative approach to the different and varied components of the CEC Work Plan. Their presentations provided us with a wealth of information that served as a useful springboard from which to frame our advice in this letter. EPA staff clearly used its resources diligently to assure that the best possible experts were available with minimal notice and the GAC strongly applauds their superior effort on this score.

As always, it is a pleasure to have the opportunity to provide you with our insight on these very important issues. In order to facilitate the preparatory discussions that are scheduled to occur during the next month, the GAC has reviewed and provided advice on various portions of the CEC work program in the attachments following this letter. We did so to provide you with the most useful advice during the upcoming trilateral meetings which will address the direction of the CEC Work Plan in the upcoming US leadership year. We look forward to your response to our recommendations in this as well as our previous letter, and we are ready to assist you in any way possible as you continue in a leadership capacity with the CEC.

Sincerely,

Denise Ferguson-Southard
Chair
Governmental Advisory Committee

Attachments

cc: Judith Ayres, Assistant Administrator for International Activities

Jonathan Plaut, Chair, Joint Public Advisory Committee
U.S. Governmental Advisory Committee
Canadian National Advisory Committee
Mexican National Advisory Committee
U.S. National Advisory Committee
Governmental Advisory Committee
to the U.S. Representative to the
Commission for Environmental Cooperation

GAC Advice No. 2002-6

The Administration and Strategic Direction of the CEC

On the broadest level, we encourage the U.S. to continue its strong support for the work of the CEC to carry out the organization's mission and an open, fair and inclusive process which is transparent for its constituency throughout North America. Generally, we believe that in order to achieve these goals and extend the continued vitality and development of the CEC as the unique trilateral body it is, this Administration must select an esteemed staff of the highest caliber, who can effectively demonstrate an ability to execute the work of the organization through prompt action, which is unquestionably supported by the United States.

The pivotal position of the Executive Director has been vacant for several months since shortly following the Ottawa Council meeting which took in June of this year. It is imperative that this most important position be filled promptly with an individual who has intelligence, integrity and a high level of enthusiasm for the work of this esteemed organization. We understand that the advertisement for the position recently closed in October of 2002 and that the JPAC has been engaged with you in this effort to appropriately recruit and fill this position. We cannot over emphasize, however, the need for deliberate and expeditious action to fill this positions quickly in order to sustain the morale of the Secretariat, to continue the activities of the CEC and to communicate to the world that the United States is still committed to the principles upon which the CEC was founded.

Mr. Douglas Wright, the new Program Director of the CEC, has indicated that his focus will be on developing a more strategic approach in the context of the CEC Work Plan, as well as it's long term vision and budgetary goals, while also incorporating effective measurement and evaluation tools in the process. The GAC strongly supports this approach and believes that an essential focus for the CEC in the upcoming year should finalizing a strategic but unique vision for itself on the North American continent. We are strongly encouraged by his remarks identifying a firm commitment to developing a cohesive and comprehensive approach that should served the Commission well into the next decade. What is essential in such an approach is to identify measurable and achievable goals that have specific and realistic end points that are rigorously adhered to by the CEC. We cannot emphasize the extraordinary importance of such an effort and remain available to support it in any manner possible.

What must also be apart of this effort is the consolidation of a myriad of review activities that are currently underway at the CEC to distill the essential information and lessons learned in the most efficient and cost-effective fashion. Those efforts include the CEC 10-year retrospective, the Strategic Work Plan and State of the Environment report. It is essential that they be coordinated, clarified and integrated the fullest extent possible in order to efficiently and effectively use resources. What may be key to this reorganization is the clear articulation of a CEC philosophy and vision statement on the importance and strategic advantage of the CEC while clearly articulating the actions, both from a programmatic and business (budgetary and administrative) perspective, which will achieve that vision. Several of the themes which may be essential to address and target in the vision is (1) the nexus between trade and environment which must include addressing the missed opportunities in implement Section 10(6) of the NAAEC and trade disputes under Chapter 11 of NAFTA, (2) the opportunities that exist to address the environment through unique, private finance options and (3) the need for an increased budget at the CEC given that the budget has shrunk, in terms of real dollars, over the past 10 years with out any increases agreed to between the Parties. Any studies or reports which clearly demonstrate the latter category should be included in the work, along with information regarding how the Secretariat has leveraged the limited resources it has through aligning itself and activities with outside entities that have contributed significant resources to the mutually beneficial work of the CEC.

Finally, the continuity within the organizations and its components are essential and it would be our recommendation that, to the extent that the U.S. looks at its members on the Joint Public Advisory Committee and decides what its composition should be, that there be a decision to continue some existing members for the sake of providing the historical perspective, knowledge and expertise in the U.S. representation on that august body.

Governmental Advisory Committee
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GAC Advice No. 2002-7

2003-2005 Work Plan Organizational Structure

In our view, the CEC Work Plan serves three important but distinct purposes. It provides a comprehensive budget the CEC's activities during the relevant time period. It also serves as a public informational and educational document which appraises its constituency of the breadth and depth of the CEC's activities. Finally, it serves as a tool that identifies and prioritizes these activities for the CEC and the Secretariat staff. Although each of these purposes are extraordinarily important and central to developing a comprehensive understanding of the CEC as an organization, the Work Plan, by doing so much at one time does not serve any of these individual roles particularly well. In other words, the Work Plan serves many masters but none too well.

Our recommendation is that a rigorous evaluation occur to develop the appropriate vehicle for each of these functions in a meaningful and sufficient fashion. This examination would result creating separate documents that will effectively serve each of the three functions outlined above. For example, it would be appropriate for a separate budget document to be created for public consumption which compares funding of projects in prior years as well as predicts future funding needs until the anticipated completion date of the project. It can identify the percentage of funding for each program, as compared to the total CEC budget, while also displaying revenues as compared to expenses.

Because of the challenges with the current Work Plan regarding its organizational structure, the GAC is constrained from giving the type of strategic, visionary and overarching advice which emphasizes the prioritization of CEC's work across programs. In order to address this issue in the future, our recommendation is that the Work Plan be revised to establish a firm plan with beginning and end dates for each project. Additionally, it is essential that outcomes be established for the projects as well as process that reviews the CEC's success at achieving these outcomes. What would further enhance this effort is to identify essential partners from organizations outside of the CEC who may be engaged and can further leverage the limited resources of the CEC, while helping to achieve the good work. To the fullest extent possible, identifying the type of additional resources that these partners may bring to bear in bringing the project to fruition and completion would also be very useful, as well as stewardship over particular projects beyond the time that the CEC will be engaged. This is particularly necessary in projects such as the development of databases (e.g. NABSI, Water Resources, Marine Protection Areas, etc.) where it may not be possible for the CEC to provide the continued support into the indefinite future the foundational information for these databases has been established. Essentially our recommendation is to use the Work Plan to establish and lay out the steps to achieve the on-going priorities of the CEC recognizes that it is not a simple report but an organic, vibrant document that must evolve over time.

One piece of information which we feel would be useful and could be included in the Work Plan as a separate item is a comprehensive listing of the various workgroups, membership and duties that are performing a variety of functions in support of the CEC's good work on the North American continent. Having such a list would provide an opportunity for determining additional opportunities to leverage workgroup activities conducted under the auspices of the Work Plan. Finally, in order to facilitate the work of our advisory group, it would be extremely helpful to have a quarterly calendar of anticipated events, meetings between the Parties and their representatives, as well as preparatory sessions within the U.S. delegation. With such information, it would give our committee a better sense of the window of opportunity for creating the relevant advice which will support the great work of the CEC.

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GAC Advice No. 2002-8

Overarching Thematic Issues with the CEC Work Plan

The GAC identified several overarching issues which were present in the current Work Plan, which are discussed below. Because of the organizational issues associated with the Work Plan which were identified in GAC Advice Nos. 2002-6 and 2002-7, we have limited any additional discussion of the Work Plan to the individual programs which were identified in the presentations during our most recent October meeting.

Among the overarching issues which should be addressed in the current Work Plan, water conspicuous by its absence, although it has been a constant theme during this past year of the CEC's activities, beginning with the elevation of this issue to the Council during the 2001 meeting in Guadalajara, Mexico. The options paper developed has identified a variety of theme and approaches which may be targeted in the CEC's efforts associated with finding its niche on water and the North American continent, but what is a significant missed opportunity is the issue of water as a commodity and the trade-related implications (i.e. bulk water). Transboundary issues related to water is major concern on this continent. North America is uniquely blessed with an abundance of water, primarily along the U.S. and Canadian border, as well as in Canada which owns approximately 7% of the world supply of freshwater. Shortages in the southern portion of the continent as well as quality issues across the continent in both groundwater and surface waters remains a troubling yet challenging paradox that needs to be addressed in any coherent agenda targeting water as a theme. Underlying any such approach must be the tenet of sustainability for all communities across the North American continent.

The GACs advice is that the CEC needs to identify strategically where water fits in the Work Plan and must then coherently pull all other water-related projects under that umbrella. The starting point could be to identify the environment and trade link in the water-context then to build a programmatic approach that addresses those tensions.

Having addressed the substantive approach, the CEC must then dedicate the appropriate level of funding beyond the proposed \$25,000 Canadian to assure that adequate resources will be dedicated to such an extraordinary continental challenge. Obviously limited CEC resources can be more fully leveraged by integrating the existing knowledge, experience, and resources of entities who have already engaged in this challenging arena. Once the Work Plan addresses these issues, we request that the results be quickly communicated to us so that we can provide further guidance on the opportunities that exist to reap the greatest benefit from the selected approach.

Another overarching issue, which can be included in the issue of transparency, involves the GAC's desire to see a fully engaged effort to include indigenous peoples in all aspects of the

CEC's good work and programs. We believe that is integral to this approach is building an indigenous component into each project's framework during its development and planning stage as opposed to identifying it late in the process as an add-on which must be addressed in haste. Existing federal-level data maintained or available to each of the Parties should be identified and built upon to fully identify indigenous constituencies throughout North America, and then tap into their expertise. Also, a part of integrating such a perspective into the work of the CEC cannot be divorced from pursuing every available opportunity to employ the abundant talent of indigenous people within the Secretariat to ensure their full engagement in the CEC's efforts.

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GAC Advice No. 2002-9

Identified Issues among the Various Programs of the CEC Work Plan

POLLUTANTS AND HEALTH

Children's Health Program

In the program involving Children's Health, the GAC believes that an opportunity exists to seek existing data to be used in support of any identified project through a variety of entities in North America that are already engaged in compiling such information. In the U.S. alone, there are a variety of state and federal public health entities that legally are required to compile a variety of data for the purposes of carrying out their public mandates. There is a need to identify national leadership organizations which these entities are affiliated with to engage in a coherent discussion of how best to establish and facilitate linkages with this existing information. More broadly, since a project has yet to be identified in this area, it would behoove those involved to look at existing pilot projects that involve environmental, agencies and public health agencies associated with Children's Health issues to learn from existing efforts how best to approach this area as well as to determine whether there are opportunities to form partnerships with existing efforts prior instead of initiating an independent but duplicative initiative.

Sound Management of Chemicals Program

In the Sound Management of Chemicals (SMOC) program, it is important that the CEC workgroup provide a feedback loop to those constituencies that have engaged with it in developing this important work. In other words, the workgroup must report back to people who participate in sessions contemporaneously with decisions being made, but prior to them being finalized. Additionally the GAC supports the exchange of information and leveraging of resources across workgroups, as recently occurred between the SMOC and Pollutant Release and Transfer Repository (PRTR) workgroups. An opportunity may also exist to integrate the Pollution Prevention work into this effort to provide even greater internal coordination and leveraging among the CEC programs. As a final comment in the SMOC program, it is extremely important to effectively monitor the progress which is being made by the Parties in implementation of the NARAPs to assure that their development is not simply reduced to a paperwork exercise, but a meaningful regulatory effort across North America. The CEC must support SMOC workgroup's effort to assure that this occurs.

Pollution Prevention Program

In the CEC's Pollution Prevention program, EPA must immediately select participants for the North American Pollution Prevention Partnership and the Regional Pollution Prevention workgroup. The importance of this participation cannot be overemphasized and would lead to constructive, direct participation by the U.S., instead of the current role of outside commentator who seems somewhat disengaged in the process and work. We can build upon the successes of the Mexican partnership while focusing upon P2 activities provide demonstrable efficiency and cost savings to targeted businesses who will only leap at tangible economic advantage during these recessionary times.

The GAC would like to note the reduction in CEC financial support for the successful P2 loan program and voice our concern regarding this decision. Additionally, the promotion of these efforts in Mexico were reduced by \$13,000 and question whether the appropriate priorities being established in a systematic way for the P2 program. EPA must look at how the U.S. can better influence priorities for this program in an articulable and constructive fashion by direct engagement if they disagree with the current focus. And finally, the GAC believes that an extraordinary opportunity exists to expand EPA's P2 database to provide information relating to the North American continent instead of having the CEC create a separate and new one. This leaves the U.S. with the long term stewardship role and leaves the CEC free to use its limited resources in other tangible ways.

Pollutant Release and Transfer Registry Program

The GAC applauds the technical assistance provided through this program to Mexico. We understand that Mexico has developed draft regulations to implement the broad mandates of its new law which invigorates their existing program while moving it to the next level in its implementation. We are not in a position to comment upon these draft regulations since we were informed that cannot currently be shared with us. Our position, however, remains that the Mexican system must be comparable with others on the North American continent to support the best and most effective use of this extraordinary information.

The GAC continues to strongly support CEC's role in the Taking Stock report, would suggest looking to each party to take the direct lead over their portion of the report and providing the resources to produce it through a trilateral work group. Finally, there must be an exit strategy for the CEC program from this area developed. Obviously the place for such a determination would come through the development of the type of strategic vision alluded to by CEC Program Director Doug Wright.

ENVIRONMENT AND TRADE

10(6) and NAFTA Article 11

The GAC was very pleased with the informative and detailed briefing from the U.S. State

Department regarding the pending and completed arbitrations brought pursuant to Article 11 of NAFTA. We are encouraged by the partial resolution of several claims raised in the Methenex case. But our underlying concerns remain on the substance and the procedures associated with Article 11 and its continuing ability to create friction and potential retrenchment by the NAFTA Parties in the environmental regulatory context.

We remain troubled by the lack of clear guidance of the law that applies on taking and appropriations. We understand that there may be an informal understanding that customary international law is to apply in the NAFTA, trade-dispute context. We need a clear and formal determination on this issue to lay it to rest. There is still a question about the tension between NAFTA trade sanctions and the legitimate exercise of a US regulatory agencies public health and welfare legal authority that has not been clearly answered by the existing arbitration awards. The Kenex case is the next arbitration that directly raises this issue and we believe that instead of awaiting a resolution of that matter, the Parties should affirmatively establish or clarify the applicable legal principles so as to avoid a chilling effect upon U.S. regulatory entities.

As a footnote to this discussion, we'd like to compliment the State Department for posting of the status of pending arbitrations on line. The GAC remains, however, concerned about the openness of the process and we believe that there must be the desire and drive at the highest level of the agency to make the arbitration process as open and transparent as humanly possible in order for it to truly live up to its fullest potential. The GAC also strongly endorses the approach elucidated in a communiqué from the Council advocating a forum for interested parties to give their views on the operation and implementation of Chapter 11 as part of steps to facilitate public input. The U.S. should work directly with our trade counterparts to facilitate the occurrence of this unique meeting.

We are disappointed that the meeting which has been proposed between the trade and environment ministers of the Parties has been indefinite postponement and find this posture to be unacceptable. It appears that the current view is, unless an appropriate agenda is developed, the meeting should not occur. We reiterate our prior advice which asserts the need for this meeting to establish how the tensions between the trade and environment issue effectively anticipated and addressed through Article 10(6) of the NAAEC.

BIODIVERSITY

The GAC notes that the Biodiversity workgroup is not representative enough of indigenous people, as well as state entities that are fully engaged in this work within the U.S. It is our firm recommendation, consistent with our discussion in GAC Advice No.2002-7 that coherent and effective measures be taken to address this missed opportunity.

LAW AND POLICY

Articles 14 and 15 Citizen Submissions

CEC has a record number of factual records to finalize prior to the Council session scheduled for June of 2003 in the U.S. As they are prepared by the Secretariat for review and the vote of the Council, the GAC emphasizes that they should be dealt with expeditiously so as to avoid future bottlenecks. They also should be dealt with on their individual merit so that the citizen submission process lives up to its fullest potential as contemplated by the NAAEC. Also given the importance of this process for truly manifesting the goals of transparency and public participation, there is need to ensure that have sufficient resources dedicated to so that only factual records of the highest caliber will result form the process. There remains the need to determine what to the appropriate follow up with be after the issuance of a factual record, consistent with the Joint Public Advisory Committee's outstanding advice to Council on the Articles 14 and 15 process.